No. 95-789

In The

Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS, COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC., MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether Congress intended, in enacting the Employee Retirement Income Security Act, to preempt states' traditional regulation of wages, apprenticeship and state-funded public works construction when that regulation is expressed in a state prevailing wage law that restricts contractors' payment of lower apprentice-specific wages to apprentices duly registered in programs approved as meeting federal standards.

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I. INTEREST OF AMICI CURIAE

With the written consent of all parties, Amici Curiae California Apprenticeship Coordinators Association (hereinafter "CACA") and the Foundation for Fair Contracting (hereinafter "FFC"), file the following brief in support of Petitioners California Department of Industrial Relations (hereinafter "DIR"), Division of Labor Standards Enforcement (hereinafter "DLSE"), and the County of Sonoma (hereinafter "County") seeking reversal of the June 7, 1995 decision of the U. S. Court of Appeals for the Ninth Circuit in *Dillingham Construction v. County of Sonoma*, 57 F.3d 712 (1995), reprinted in the Appendix to the Petition for Writ of Certiorari ("App.") at App. 1-12.

CACA is a California nonprofit corporation whose members represent labor-management joint apprenticeship committees ("JACs") from all of the California construction industries' union/management joint apprenticeship programs. CACA represents over fifty JACs under whose auspices 25,000 registered apprentices are being trained throughout the State of California.

The member JACs of CACA are governed by committees consisting of equal numbers of union representatives and management representatives. The union organizations include every building trades union. Over 25,000 building trades apprentices are registered in programs approved by the State of California. The management organizations include general contractors and subcontractor members of construction trade associations who employ such apprentices on both private and public

construction work in the State of California. Those contractors who perform public construction work in California are governed by the prevailing wage requirements found in California Labor Code section 1720, *et seq.* They benefit from the apprenticeship exemption from the prevailing wage requirement which was challenged in this litigation.

The Foundation for Fair Contracting ("FFC") is a joint labor-management California non-profit corporation which monitors public works projects to determine whether contractors are complying with California's prevailing wage laws. The employer member organizations of FFC include the Associated General Contractors of California, the Association of Engineering Construction Employers and the Engineering and Utility Contractors Association. The members of these associations serve on the JACs and employ apprentices on both private and public construction work throughout Northern California. The union member organizations of FFC include Operating Engineers Local Union No. 3, the Northern California District Council of Laborers, the Northern California District Council of Cement Masons and the California and Vicinity District Council of Ironworkers. All of these unions participate in state approved apprenticeship programs.

Both CACA and FFC believe that the prevailing wage laws and the regulation of apprenticeship programs are important to the taxpayers and citizens of California since they provide a mechanism to allow public agencies in California to contract for meaningful training of young people, minorities and women on state public works construction.

The State of California permits contractors to pay rates lower than prevailing journeyman wage rates to apprentices registered with its Division of Apprenticeship Standards ("DAS"). The State has a vested interest in allowing contractors to pay a lower wage rate to apprentices during their apprenticeship, because it encourages on-the-job training on public works projects.

The Ninth Circuit decision in *Dillingham* will create chaotic conditions in the construction industry. Contractors who employ apprentices will be working under different regulatory requirements, depending upon whether a project is state-funded and governed by the State's prevailing wage laws or is federally funded and subject to the prevailing wage requirements of the federal Davis-Bacon Act, 40 U.S.C. § 276a, *et seq. Dillingham* will allow unscrupulous employers to evade the prevailing wage law by enrolling their employees in unapproved sham apprenticeship programs which will permit them to claim the apprenticeship exemption.

CACA and FFC are concerned about the continued viability of their members' JACs and the potential loss of millions of dollars invested in training centers, staff and equipment which have been utilized to train over 25,000 registered apprentices throughout the State of California.

Before the *Dillingham* decision, State approval of each apprenticeship program and registration of apprentices was a precondition for exemption from the prevailing wage law. Only contractors who were certified to train apprentices under the standards of an apprenticeship program approved by the State of California, Division of Apprenticeship Standards, were allowed to pay less than

the prevailing journeyman wage rate for work performed by apprentices. This assured that only bona fide apprenticeship programs would qualify for the reduced rate.

Because of the *Dillingham* decision, confusion and uncertainty exists among CACA's and FFC's labor and management representatives as to how the State of California will enforce the prevailing wage requirements for apprentices. *Dillingham* will make it possible for contractors to establish sham apprenticeship programs which will not provide training to workers, and which will allow contractors to pay any apprentice wage rate they choose, thereby creating a competitive advantage for those contractors not interested in providing meaningful training at fair wages for young people, minorities and women.

II. STATEMENT OF THE CASE

In April 1987, Respondent Dillingham Construction N.A., Inc. (hereinafter "Dillingham"), entered into a public works contract with Petitioner County for the construction of the Sonoma County Main Adult Detention Facility. Dillingham subcontracted part of the work to Elenex Corporation, which in turn subcontracted to Manuel J. Arceo dba Sound Systems Media ("Sound Systems"). *Dillingham, supra,* 57 F.3d at 715-16. The project was subject to California's prevailing wage laws; all non-apprentice employees were required to be paid the predetermined prevailing wage.

On October 20, 1989, petitioner DLSE, after an investigation, filed a Notice to Withhold in the sum of

$45,103.37 on the funds due Dillingham under the contract with the County, pursuant to California Labor Code section 1727, for the failure of Sound Systems to pay the prevailing wage rates. California Labor Code section 1775 makes Dillingham liable for the failure of its subcontractors to pay prevailing wages. The County withheld the funds as required by law. *See* Cal. Labor Code § 1727. Dillingham and Sound Systems contested the notice, arguing that some of the Sound Systems workers were "apprentices," and that they were entitled to pay them less than the journeyman rate. The workers were not indentured as apprentices under State law and were not receiving state-approved training.

Since the facts herein are not in dispute, cross motions for summary judgment were filed before the District Court. The District Court rejected Dillingham's motion for summary judgment and granted DLSE's motion, 778 F. Supp. 1522, 1534. In so ruling, the District Court agreed with DLSE's contention that, because California's regulation of apprenticeship programs is part of a cooperative state-federal effort regarding the formulation and promotion of apprenticeship programs, it is saved from preemption by the federal Fitzgerald Act, 29 U.S.C. § 50, as incorporated in ERISA's Savings Clause, 29 U.S.C. § 1144(d). The Court further ruled that since state enforcement of minimum apprenticeship standards constitute a valid "minimum employment standard" they are not preempted by the NLRA under *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724 (1985) (*Metropolitan*) and *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987) (*Fort Halifax*).

The Ninth Circuit reversed, holding that the restriction of the apprentice prevailing wage to workers who were registered apprentices was preempted by ERISA on the following grounds:

> (1) California's application of its prevailing wage law to allow payment of the lower apprentice rate only to employees in "approved" programs had the effect and possibly the aim of encouraging participation in state-approved ERISA regulated plans while discouraging participation in unapproved ERISA regulated plans.
>
> (2) California law is not saved from preemption by the ERISA "savings clause," 29 U.S.C. § 1144(d). While the Fitzgerald Act does provide for state approval of apprenticeship programs, it does not depend on state law for enforcement, does not mandate apprenticeship programs and does not seek to discourage other types of training programs. In the view of the Ninth Circuit, the Fitzgerald Act would not be impaired by the preemption of this California law.

The court denied the Petition for Rehearing and Suggestion for Rehearing En Banc on July 19, 1995, which was based in large part on this Court's then-recent decision as to which state laws "relate to" ERISA plans. *New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers*, 115 S. Ct. 1671 (1995).

III. SUMMARY OF ARGUMENT

ERISA regulates the financial support of apprenticeship programs, but does not regulate the substantive implementation of apprenticeship programs.

Preemption of California's prevailing wage law, as it applies to apprentices, impairs the ability of the Secretary of Labor to implement and promote apprenticeship under the Fitzgerald Act and its regulations, and, therefore, is saved by ERISA's "savings clause".

The *Dillingham* decision will foster the establishment of sham apprenticeship programs that will not provide meaningful training for young people, minorities and women, and will seriously impact the ability of bona fide apprenticeship programs and legitimate contractors to compete for California's public works projects.

IV. ARGUMENT

A The Organizational Structure of Apprenticeship Training Programs Consists of Training Trust Funds that Financially Support the Apprenticeship Programs and are Regulated by ERISA and the Joint Apprenticeship Committees that Implement the Apprenticeship Regulations Promulgated Under the Fitzgerald Act.

Apprentice training trust funds are employee benefit plans within the meaning of 29 U.S.C. § 1002(1).

In *Massachusetts v. Morash*, 490 U.S. 107, 109 S. Ct. 1668 (1989), this Court set forth criteria to determine

whether a plan or program constitutes an employee welfare benefit plan within the meaning of Section 3(1) of ERISA. The Court found that:

> " . . . [I]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employee benefits from accumulated funds."[1]

Id., 109 S. Ct. at 1673.

Apprentice training trust funds are required to report and disclose their financial status, their trustees have a fiduciary duty to ensure that employees' expectation of benefits will be met by proper management of the fund by the administrator of the trust fund.

The training programs developed and administered by apprenticeship committees are employment-related programs that should not be regulated by ERISA since there is no danger of mismanagement of the funds accumulated to finance the training programs.

Apprenticeship training has two basic components:

(1) on the job training

(2) classroom-related training.

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[1] *See, e.g., Private Welfare and Pension Plan Legislation: Hearings on H. R. 1045 et al. Before the General Subcommittee on Labor of the House Committee on Education and Labor,* 91st Cong., 1st and 2nd Sess. 470-472 (1970) (testimony of Secretary of Labor concerning mismanagement of pension and Welfare funds); 120 Cong. Rec. 4279-4280 (1974) (remarks of Rep. Brademas); *id.* at 4277-4278 (remarks of Sen. Perkins); 119 Cong. Rec. 30003 (1973) (remarks of Sen. Williams).

Both components are set forth in apprenticeship standards which are established by apprenticeship committees in conformance with uniform standards adopted by the State of California's California Apprenticeship Council ("CAC"). Ch. 4, Div. III, Cal. Lab. Code §§ 3070, *et seq.*; Code of Regs. Tit. 8, § 230 *et seq.*

On the Job Training ("OJT") is the component of the apprenticeship program in which the employer provides employment to the apprentices and journeymen supervision in providing the training component on the job. Under the terms of the collective bargaining agreement, the union and the employer have established an apprenticeship program which is administered by a joint apprenticeship committee ("JAC"). The programs' standards are adopted pursuant to the uniform standards established by the Fitzgerald Act, 29 U.S.C. § 50, and its regulations, and the California counterpart, the Shelley-Maloney Act, Cal. Labor Code § 3070, *et seq.*, and its regulations adopted by the California Apprenticeship Council.

In addition to the OJT component of an apprenticeship program, both the Fitzgerald Act and the Shelly-Maloney Act regulations require classroom-related training to assure that apprentices will have sufficient written and oral skills to graduate to journeyman status. Classroom-related training is performed in conjunction with local education agencies ("LEAs") which are, high schools, junior colleges and universities that have vocational programs. The joint effort between the JAC and the LEA is supplemented by both state and federal funds through various programs that support apprenticeship. At the federal level, there is the Perkins Act,

20 U.S.C. § 2301, and at the state level, the Montoya Act, Cal. Education Code § 8152 *et seq.*, which supplies funding to the JAC and LEA for those students who attend classroom-related training at the LEA's facility.

The OJT and classroom-related training requirements are set forth in the Fitzgerald Act regulations and have been adopted by the State of California through the partnership envisioned by Congress when the law was enacted.

When the Fitzgerald Act was enacted by Congress in 1937, the intent of the sponsors of the Act was to develop a cooperative program between the federal and state governments to promote apprenticeship and to provide standards that would protect the welfare of the apprentices. Over the last 60 years, the goals of the Fitzgerald Act have been supported by approximately 37 states that cooperated with the federal government in developing comprehensive programs for the development of apprenticeship training in all segments of industry.

When ERISA was enacted in 1974, and Congress determined that the Secretary of Labor should be responsible for implementing the law, Congress was clearly aware of the forty-year-old Fitzgerald Act that granted the Secretary of Labor authority to implement and foster apprenticeship training in partnership with the states.

Although ERISA includes plans for "apprenticeship and other training", it clearly must have been the intent of Congress to regulate the funding sources of the apprenticeship and training programs and to leave the regulation of apprenticeship to other state and federal regulatory schemes. Congress never intended ERISA to

regulate the delivery system of apprenticeship through on-the-job training and classroom-related training. There is no cause for concern that employees will not receive the financial benefits that have been promised by their employers through payment of trust fund contributions to employee welfare benefit plans.

B. CACA and FFC are Concerned that the Decision in *Dillingham* will Foster the Establishment of Sham Apprenticeship Programs that will Seriously Impact Bona Fide Apprenticeship Programs that have been Approved by the State of California.

The JACs that are members of CACA, train approximately 25,000 apprentices and spend millions of dollars per year providing training facilities with the most advanced equipment and college certified instructors; whereby, they are teaching young men and women to become journeymen. Such apprenticeship programs provide the opportunities to equip young people to compete for jobs. Moreover, apprenticeship programs in California have been in the forefront of providing opportunities to women and minorities to enter into occupations requiring advanced technical training.

Prior to 1990, apprenticeship programs in the construction were predominantly jointly administered labor and management programs registered and approved by the State of California. However, during the 1990s unilateral non-union programs were established and presented to the Division of Apprenticeship Standards ("DAS") for approval. After many years of litigation,

unilateral programs have been recognized by the State of California. Although there are still substantial differences between the JACs and the unilateral programs, there has been an effort in California between all of the apprenticeship programs to establish a level playing field where uniform standards would apply irrespective of the philosophical differences between the programs.

The California Apprenticeship Council in 1993 appointed a Blue Ribbon Committee of representatives from both labor and management, including non-union management, to develop standards that would apply to all apprenticeship programs in the State. For over three years this committee has worked diligently to overcome the differences between the union and the non-union programs, and develop uniform criteria with the sole goal of the welfare of the apprentices in the State of California.

The decision in *Dillingham* severely impacts the ability of the Blue Ribbon Committee to develop uniform standards for all apprenticeship programs. If the *Dillingham* decision stands as written, it will allow unscrupulous employers to establish "apprenticeship programs" in name only and employ workers on public works jobs, classify them as apprentices, but provide no on-the-job training, and no classroom-related training. These types of sham programs will significantly impact the ability of the existing apprenticeship programs to continue to attract and maintain apprentices since the employers using the sham programs will have a competitive advantage, through lower labor costs, over legitimate contractors who support the legitimate apprenticeship programs through contributions to training trust funds.

C. California's Prevailing Wage Requirements for Apprentices Registered in State Approved Programs are Areas of Traditional State Regulation of Minimum Labor Standards.

Congress in enacting the Davis-Bacon Act, 40 U.S.C. § 276a, and California in establishing its prevailing wage law, Cal. Labor Code § 3070, *et seq.*, clearly recognized the importance of establishing prevailing wages for public works construction. Since the Davis-Bacon Act was enacted some sixty years prior to ERISA, preemption of the State's ability to regulate apprenticeship programs and require that only registered apprentices in approved programs can be paid less than the journeyman rate on public works jobs would conflict with the legislative intent of the prevailing wage laws. The courts have acknowledged the right of states to regulate minimum labor standards. *See Metropolitan Life, supra,* 471 U.S. 724; *Fort Halifax, supra,* 482 U.S. 1.

Establishment of a prevailing wage for registered apprentices prevents the lowering of labor standards and provides a level playing field for all contractors. This guarantees the State qualified apprentices who will perform quality work on its projects.

D. ERISA Preemption Conflicts with the Fitzgerald Act and the Authority Granted to the Secretary of Labor to Enter Into Cooperative Agreements with States to Promote, Develop and Maintain Apprenticeship Programs, Therefore, California's Regulation of Apprenticeship Programs is Saved by ERISA's Savings Clause.

The registration and supervision of apprenticeship programs has been delegated, pursuant to the Fitzgerald Act, to approved state apprenticeship councils in California and other states. The Fitzgerald Act directs the Secretary of Labor to both promote the furtherance of labor standards to safeguard apprentices and to cooperate with states engaged in the regulation of apprenticeship.

The Secretary of Labor has the authority to review California State regulations for approving apprenticeship programs. If the Secretary of Labor's review process discloses that California statutes or regulations do not assist in the implementation of the objectives of the Fitzgerald Act, the Secretary of Labor pursuant to Title 29, Code of Federal Regulations sections 29.2 – 29.3, has the power to require the State to amend or repeal its regulations. The Secretary of Labor can also decertify California as a state meeting Fitzgerald Act apprenticeship requirements.

On February 24, 1986, an agreement entitled "State of California Cooperative Working Agreement for the Division of Apprenticeship Standards and Bureau of Apprenticeship Training" was signed by the Regional Director and the State Director of the U. S. Department of Labor, Bureau of Apprenticeship and Training, and the Chief of the State Department of Industrial Relations, Division of Apprenticeship Standards. The preamble states:

> "The Bureau of Apprenticeship and Training and the Division of Apprenticeship Standards have a responsibility to work as complementary units to promote, develop and maintain both apprenticeship and other on-the-job training systems. This responsibility is necessary in order to carry out the provisions of Public Law 308 (Fitzgerald Act); the California Apprenticeship Law (Shelley-Maloney Apprentice Labor Standards Act of 1939, Chapter 4, Division 3, Labor Code of California); and Title 8, Chapter 2, California Administrative Code. Each agency shall maintain its own identity, but will perform similar work in a like manner to accomplish these objectives."

There also was established a committee known as the DAS-BAT State Coordination Committee, which consists of the Chief and the Deputy Chief, Division of Apprenticeship Standards, and the Regional and State Directors of the Bureau of Apprenticeship and Training. Among the functions of this committee is: (1) to "discuss and make recommendations on methods of improving and expanding apprenticeship and training in the State of California." *State of California Cooperative Working Agreement for the Division of Apprenticeship Standards and Bureau of Apprenticeship Training* (Comm., sub.6) (Feb. 24, 1986).

ERISA should not be allowed to preempt cooperative arrangements such as the DAS-BAT Agreements, since the Secretary of Labor is clearly authorized to enter into such arrangements.

ERISA's Savings Clause, 29 U.S.C. section 514(d) states:

> "Nothing in this title shall be construed to alter, amend, modify, invalidate, *impair*, or supercede any law of the United States (except as provided in section 111 and 507(b) or any rule or regulation issued under any such law."
>
> (emphasis added)

In *Joint Apprenticeship and Training Council of Local 363, International Brotherhood of Teamsters, AFL-CIO v. New York State Department of Labor, et al.*, No. 92 Civ. 1206 (S.D.N.Y., May 6, 1992) (LJF) , a state approved apprenticeship program challenged the State of New York's authority to deregister the program for failure to comply with the state's rules and regulations concerning the training of apprentices. The District Court noted that the state's authority to regulate apprenticeship programs was derived from the Fitzgerald Act and its implementing regulations, and that New York's apprenticeship regulatory agency had been approved as a state apprenticeship council by the Department of Labor. The District Court held that the state's authority to regulate apprenticeship programs was saved from preemption by ERISA's savings clause.

In *Electrical Joint Apprenticeship Committee, et al. v. McDonald*, 949 F.2d 270 (9th Cir. 1991), the court held that state and federal apprenticeship administrative agencies could exercise authority to regulate apprenticeship programs under the Fitzgerald Act and its implementing regulations. *McDonald* held that ERISA does not preempt state laws providing for approval of apprenticeship programs if such laws are applying standards that are consistent with, and aid in, implementing the Fitzgerald Act and its regulations. There can be no question that the

comprehensive regulatory scheme developed by the State is consistent with the Fitzgerald Act and its regulations.

V. CONCLUSION

Congress never intended ERISA to preempt a state's traditional regulation of apprenticeship wages on state funded public works projects where the regulation is expressed in a state prevailing wage law that restricts contractors' payment of lower apprentice wages to apprentices registered in apprenticeship program approved by the state utilizing federal standards.

Respectfully submitted,

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